

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-74270; File No. SR-NSX-2014-017)

February 13, 2015

Self-Regulatory Organizations; National Stock Exchange, Inc.; Order Granting Approval of Proposed Rule Change in Connection with a Proposed Transaction in Which National Stock Exchange Holdings, Inc. Will Acquire Ownership of the Exchange from the CBOE Stock Exchange, LLC

I. Introduction

On December 16, 2014, National Stock Exchange, Inc. (“NSX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to make certain amendments to its corporate governance documents in order to effectuate a proposed transaction (the “Transaction”) in which the Exchange will become a wholly-owned subsidiary of National Stock Exchange Holdings, Inc., a Delaware corporation (“NSX Holdings”). The proposed rule change was published for comment in the Federal Register on January 2, 2015.<sup>4</sup> The Commission received no comments on the proposal.

The Commission has reviewed carefully the proposed rule change and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 73944 (December 24, 2014), 80 FR 85 (SR-NSX-2014-017) (“Notice”).

<sup>5</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

the proposed rule change is consistent with Sections 6(b)(1) and (3) of the Act,<sup>6</sup> which, among other things, require a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act, and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange, and assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>7</sup> which requires that the rules of the exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

## II. Discussion

### A. Corporate Structure and Proposed Transaction

Currently, the Exchange is a wholly-owned subsidiary of the CBOE Stock Exchange, LLC (“CBSX”).<sup>8</sup> Pursuant to the terms of a Stock Purchase Agreement, dated September 8, 2014, by and among CBSX, NSX Holdings and the Exchange (the “SPA”), NSX Holdings has agreed to acquire all of the outstanding capital stock of NSX upon the closing of the Transaction

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<sup>6</sup> 15 U.S.C. 78f(b)(1) and (b)(3).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> CBSX is the record and beneficial owner of 100 shares of the Exchange, par value \$.01 per share, which represents all of the issued and outstanding shares of capital stock of the Exchange. See Notice, *supra* note 4, at 86.

(the “Closing”) in return for cash consideration paid to CBSX.<sup>9</sup> Following the completion of the Transaction, the Exchange will remain a Delaware for-profit stock corporation with authority to issue 1,000 shares of common stock and, at all times, all of the outstanding stock of the Exchange will be owned by NSX Holdings.

The Exchange is, and will remain, registered as a national securities exchange under Section 6 of the Act<sup>10</sup> and a self-regulatory organization (“SRO”) as defined in Section 3(a)(26) of the Act<sup>11</sup> after the Closing.<sup>12</sup> The Exchange states that it plans to reopen its trading operations as soon as practicable after the Closing and plans to operate the Exchange using its existing trading system pursuant to the rules of the Exchange currently in effect (the “Exchange Rules”).<sup>13</sup> However, the Exchange states that the re-opening of its marketplace will be subject to additional proposed rule changes filed by the Exchange with the Commission and such proposed rule changes being approved by the Commission.<sup>14</sup> In addition, the Exchange states that the Exchange Rules, all of which remain in full force and effect as of the date of the instant rule filing, will continue to govern the activities of the Exchange up to and after the Closing, and the Exchange will continue to discharge its SRO responsibilities pursuant to the Exchange’s

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<sup>9</sup> For a more detailed explanation of the conditions necessary to effectuate the Closing, see Notice, supra note 4, at 86, n.8.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78c(a)(26).

<sup>12</sup> See Notice, supra note 4, at 86.

<sup>13</sup> See Notice, supra note 4, at 86. The Exchange ceased trading operations as of the close of business on May 30, 2014. See Exchange Act Release No. 72107 (May 6, 2014), 79 FR 27017 (May 12, 2014) (SR-NSX-2014-14) (“Cessation of Operations Filing”).

<sup>14</sup> See Notice, supra note 4, at 86. The Cessation of Operations Filing stated that the Exchange shall file a proposed rule change pursuant to Rule 19b-4 of the Act prior to any resumption of trading on the Exchange pursuant to Chapter XI (Trading Rules) of the Exchange Rules. See Notice, supra note 4, at 86, n.11.

registration under Section 6 of the Act.<sup>15</sup> Furthermore, assuming consummation of the Transaction, the Exchange noted that NSX Holdings has represented that, at all times, it will ensure that the Exchange has access to sufficient financial resources for it to discharge its SRO responsibilities after the date of the Closing.<sup>16</sup>

The ownership of NSX Holdings, as the new holding company of the Exchange, will be divided among two categories of shareholders.<sup>17</sup> The first category of shareholders will be comprised of 12 individual investors who, in the aggregate, will own approximately 64% of the outstanding shares of NSX Holdings.<sup>18</sup> At the time of the closing of the Transaction, the Exchange has represented that one individual investor may own in the aggregate more than 40% of the outstanding shares of NSX Holdings.<sup>19</sup> According to the Exchange, four of the 12 individual investors in NSX Holdings, owning in the aggregate approximately 60% of the outstanding shares, are securities industry and technology professionals with senior executive managerial experience in areas including capital markets and investment management, exchange operations, electronic trading, and systems architecture and development.<sup>20</sup> The Exchange anticipates that these four individuals will assume senior executive roles in the Exchange's

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<sup>15</sup> See Notice, supra note 4, at 86.

<sup>16</sup> See Notice, supra note 4, at 86.

<sup>17</sup> See Notice, supra note 4, at 87.

<sup>18</sup> The Exchange has represented that, pursuant to Rule 6a-2 under the Act, within 10 days of the Closing, the Exchange will amend its Form 1 filed with the Commission. Exhibit K of Form 1, which is applicable only to “exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange. . .”, requires the Exchange to provide a list of each shareholder that directly owns 5% or more of a class of a voting security of the Exchange. As discussed above, the Exchange has proposed that 100% of the issued and outstanding shares of NSX be directly owned by NSX Holdings. See Notice, supra note 4, at 87, n.16.

<sup>19</sup> See discussion infra at 8 regarding exemption from the Concentration Limitation.

<sup>20</sup> See Notice, supra note 4, at 87.

management upon completion of the Transaction.<sup>21</sup> The remaining eight individual shareholders of NSX Holdings own shares in amounts ranging from approximately 0.063% to 1.269%.<sup>22</sup>

The second category of shareholders of NSX Holdings consists of two affiliated entities: Thor Investment Holdings LLC (“Thor”) and TIP-1 LLC (“TIP-1”), each a Delaware limited liability company.<sup>23</sup> Thor will own approximately 16% of the outstanding equity of NSX Holdings, and TIP-1 will own approximately 20% of the outstanding equity of NSX Holdings.<sup>24</sup>

The Exchange notes that there is no commonality or overlap between the 12 individual investors owning approximately 64% of the outstanding shares of NSX Holdings and the individual members of Thor and TIP-1 which own the remaining approximately 36% of the outstanding equity of NSX Holdings.<sup>25</sup> No individual has an ownership interest in both Thor and TIP-1.<sup>26</sup> Furthermore, none of the individual members of Thor or TIP-1 will become an employee of the Exchange, and none of these individual members will have any role in the day-to-day management or operation of the Exchange.<sup>27</sup>

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<sup>21</sup> See Notice, supra note 4, at 87.

<sup>22</sup> See Notice, supra note 4, at 87, n.17.

<sup>23</sup> See Notice, supra note 4, at 87.

<sup>24</sup> See Notice, supra note 4, at 87. Thor will also have an ownership interest in TIP-1 and will act as its managing member. Thor’s management will be vested in a managing member, Thor Managing Member LLC (“Thor MM”), which will have no ownership interest in either Thor or TIP-1. There are three individual members of Thor MM, all of whom are also members of Thor. There are also currently nine individuals who are members of Thor. The Exchange anticipates there will be six members of TIP-1, including Thor. Each such member thereby has an ownership interest in the respective entities’ share of the outstanding equity of NSX Holdings. See Notice, supra note 4, at 87.

<sup>25</sup> See Notice, supra note 4, at 87.

<sup>26</sup> See Notice, supra note 4, at 87.

<sup>27</sup> See Notice, supra note 4, at 87.

With respect to voting rights, Thor will have the ability to exercise TIP-1's voting rights in NSX Holdings, such that Thor will have the ability to exercise an approximately 36% voting interest of NSX Holdings (Thor's approximately 16% plus TIP-1's approximately 20%).<sup>28</sup> However, Thor will not be able to exercise its voting interest in excess of the 20% voting limitation because of voting limitations contained in the NSX Holdings A&R Certificate.<sup>29</sup>

The Exchange currently has one affiliated entity, NSX Securities LLC ("NSX Securities"). Pursuant to Exchange Rule 2.11(a), NSX Securities provides the outbound routing of orders from the Exchange to other trading centers. NSX Securities operates as a facility (as defined in Section 3(a)(2) of the Act)<sup>30</sup> of the Exchange. The Exchange represents that upon the Closing, Exchange Rule 2.11 will remain in full force and effect and the sole change impacting NSX Securities will be the change of ownership of the Exchange (from CBSX to NSX Holdings) as NSX Securities' sole affiliate.<sup>31</sup>

#### B. Proposed Rule Changes

Section 19(b) of the Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although NSX Holdings is not an SRO, certain provisions of its proposed certificate of incorporation and bylaws, are rules of the Exchange, if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, and must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b-4 thereunder. Accordingly, the Exchange filed with the Commission the following documents in connection

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<sup>28</sup> See Notice, supra note 4, at 87.

<sup>29</sup> See Notice, supra note 4, at 87.

<sup>30</sup> 15 U.S.C. 78(c)(a)(2).

<sup>31</sup> See Notice, supra note 4, at 86. The Exchange further represented that it, on behalf of NSX Securities, will provide notice to and obtain any required consents from FINRA for the NSX change of ownership. See Notice, supra note 4, at 86.

with the Transaction: (1) the proposed Second Amended and Restated Certificate of Incorporation of NSX Holdings (the “NSX Holdings A&R Certificate”); (2) the proposed By-laws of NSX Holdings (the “NSX Holdings By-laws”); (3) the proposed Second Amended and Restated Certificate of Incorporation of NSX (the “Exchange A&R Certificate”); and (4) the proposed Third Amended and Restated NSX By-laws (the “Exchange A&R By-laws”).

1. NSX Holdings Ownership and Voting Limitations

The NSX Holdings A&R Certificate includes certain restrictions on the ability to own and vote shares of stock. These limitations are intended to prevent a stockholder from exercising undue control over the operation of NSX Holdings, and in turn, over the operation of the Exchange. These limitations are generally consistent with ownership and voting limits approved by the Commission for other SROs,<sup>32</sup> and are designed to assure that the Exchange and the Commission are able to carry out their regulatory obligations under the Act.

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<sup>32</sup> These provisions are generally consistent with ownership and voting limits approved by the Commission for other SROs. See e.g., Securities Exchange Act Release Nos. 71375 (January 23, 2014) 79 FR 4771 (January 29, 2014) (SR-BATS-2013-059; SR-BYX-2013-039) (order approving proposed business combination involving BATS Global Markets, Inc. and Direct Edge Holdings LLC); 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR-NYSE-2013-42, SRNYSEMKT-2013-50 and SR-NYSEArca-2013-62) (order approving proposed transaction in which NYSE Euronext will become a wholly owned subsidiary of IntercontinentalExchange Group, Inc.); 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order approving registration application of BYX as a national securities exchange); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order approving registration application of EDGX Exchange, Inc. and EDGA Exchange, Inc.); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order approving registration of BATS as a national securities exchange); 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120) (order approving proposed combination between NYSE Group, Inc. and Euronext N.V.); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving merger of New York Stock Exchange, Inc. and Archipelago, and demutualization of New York Stock Exchange, Inc.); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (File No. SR-NSX-2006-03); 53128 (January 13, 2006), 71 FR 3550 (File No. 10-131) (order approving registration application of NASDAQ as a national securities exchange); 51149 (February 8, 2005), 70 FR 7531

For example, the NSX Holdings A&R Certificate provides that, subject to certain exceptions, no Person,<sup>33</sup> either alone or with its Related Persons<sup>34</sup> shall be allowed at any time to own beneficially shares of stock of NSX Holdings representing in the aggregate more than 40% of the then outstanding votes entitled to be cast on any matter (“Concentration Limitation”).<sup>35</sup>

Because the Exchange anticipates that one shareholder will own beneficially more than 40% of the outstanding shares of NSX Holdings at the Closing, the Exchange has proposed that a Person (either alone or with their Related Persons) who exceeds the Concentration Limitation as of the filing date of the NSX Holdings A&R Certificate shall be exempt from the Concentration Limitation. The exemption shall not extend beyond May 19, 2015.<sup>36</sup> The Commission believes that the proposed exemption is consistent with the requirements of Section 6(b) of the Act.<sup>37</sup> The Commission believes that an exemption for this specific period of time should allow a shareholder sufficient time after the Closing to reduce his or her ownership percentage in order to comply with the Concentration Limitation.

Pursuant to NSX Holdings A&R Certificate, Article Fourth, Section C(i)(a), the Concentration Limitation applies unless and until: (i) a Person (either alone or with its Related

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(February 14, 2005) (SR-CHX-2004-26); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73).

<sup>33</sup> See NSX Holdings A&R Certificate, Article Fourth, Section B (defining “Person”).

<sup>34</sup> See NSX Holdings A&R Certificate, Article Fourth, Section B (defining “Related Persons”).

<sup>35</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(i).

<sup>36</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(i). See also Notice, *supra* note 4, at 87.

<sup>37</sup> The Commission previously has approved a period of time for the reduction of share ownership concentration. See Securities Exchange Act Release No. 45803 (April 23, 2002), 67 FR 21306 (April 30, 2002) (SR-ISE-2002-01) (allowing a temporary exemption, not to extend past a date certain, from ownership concentration limits).

Persons) intending to acquire such ownership shall have delivered to the Board of Directors of NSX Holdings (the “Holdings Board”) a notice in writing, not less than 45 days (or such shorter period as the Holdings Board shall expressly consent to) prior to the acquisition of any shares that would cause such Person (either alone or with its Related Persons) to exceed the Concentration Limitation, of its intention to acquire such ownership; (ii) the Holdings Board shall have resolved to expressly permit such ownership; and (iii) such resolution shall have been filed with the Commission under Section 19(b) of the Act and shall have become effective thereunder.<sup>38</sup>

The Exchange has provided for additional safeguards that must be satisfied in the event a Person alone or with their Related Persons seeks an exemption from the Concentration Limitation. For example, the Holdings Board shall not adopt any resolution permitting an exemption from the Concentration Limitation unless the Holdings Board first determines that such acquisition of beneficial ownership by such Person (either alone or with its Related Persons) (i) will not impair any of NSX Holdings’ or NSX’s ability to discharge its responsibilities under the Act and the rules and regulations thereunder, and is otherwise in the best interests of NSX Holdings and its stockholders; (ii) such acquisition of beneficial ownership by such Person (either alone or with its Related Persons) will not impair the Commission’s ability to enforce the Act; and (iii) neither such Person nor any of its Related Persons is subject to any statutory disqualification as defined in Section 3(a)(39) of the Act.<sup>39</sup>

The NSX Holdings A&R Certificate further provides that, in making such determinations, the Holdings Board may impose such conditions and restrictions on a Person and

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<sup>38</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(i)(a).

<sup>39</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(i)(b).

its Related Persons owning any shares of stock of NSX Holdings entitled to vote on any matter as it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of NSX Holdings.<sup>40</sup> In the event that a Person (either alone or with its Related Persons) at any time owns beneficially shares of stock of NSX Holdings in excess of the Concentration Limitation without having first satisfied the requirement of providing timely written notice to the Holdings Board, and the Holdings Board expressly permits such ownership and files the resolution with the Commission pursuant to Section 19(b) of the Act, NSX Holdings must call from such Person and its Related Persons that number of shares of stock of NSX Holdings entitled to vote on any matter that exceeds the Concentration Limitation at a price equal to the par value of such shares of stock.<sup>41</sup>

The NSX Holdings A&R Certificate also provides for limitations on ownership of shares by ETP Holders of NSX.<sup>42</sup> As long as NSX remains registered as a national securities exchange under Section 6 of the Act, no ETP Holder (either alone or with its Related Persons) shall be permitted to own beneficially shares of stock of NSX Holdings representing in the aggregate more than 20% of the then outstanding votes of NSX Holdings stock entitled to be cast on any matter.<sup>43</sup> If any ETP Holder (either alone or with its Related Persons) at any time owns beneficially shares of stock in excess of such 20% limitation, NSX Holdings shall call from such ETP Holder and its Related Persons that number of shares of stock of NSX Holdings entitled to

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<sup>40</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(i)(b).

<sup>41</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(i)(c).

<sup>42</sup> See Exchange Rule 1.1E.(1) for definition of the term “ETP.”

<sup>43</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(ii).

vote on any matter that exceeds such 20% limitation at a price equal to the par value of such shares of stock.<sup>44</sup>

With respect to voting limitations, Article Fourth, Section B(i) of the NSX Holdings A&R Certificate provides that, notwithstanding any other provisions of that document, no Person (either alone or with its Related Persons) as of any record date for the determination of stockholders entitled to vote on any matter, shall be entitled to vote or cause the voting of shares of stock of NSX Holdings, in person or by proxy or through any voting agreement or other arrangement, to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on such matter (the “Voting Limitation”). If votes have been cast, in person or by proxy or through any voting agreement or other arrangement, by any Person (either alone or with its Related Persons) in excess of the Voting Limitation, NSX Holdings shall disregard such votes in excess of the Voting Limitation.<sup>45</sup> The Voting Limitation (or Nonvoting Agreement Prohibition) shall apply unless and until a Person (and its Related Persons) owning any shares of stock of NSX Holdings entitled to vote on such matter shall have delivered to the Holdings Board a notice in writing, not less than 45 days (or such shorter period as the Holdings Board shall expressly consent to) prior to any vote, of its intention to cast more

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<sup>44</sup> See NSX Holdings A&R Certificate, Article Fourth, Section C(ii).

<sup>45</sup> NSX Holdings A&R Certificate, Article Fourth, Section B(i) prohibits “Nonvoting Agreements” by or among Persons and their Related Persons that would result in shares of stock that would be subject to such agreement not being voted on any matter, or the withholding of any proxy relating to those shares, where the effect of such an agreement would be to enable any Person, either alone or with its Related Persons, to vote or cause the voting of shares representing in the aggregate more than 20% of the then outstanding votes entitled to be cast (the “Nonvoting Agreement Prohibition”). Any share owner seeking a waiver of the Nonvoting Agreement Prohibition so as to be able to enter into such an agreement would also be required to obtain express permission of the Holdings Board through a duly authorized written resolution that is filed with and approved by the Commission pursuant to Section 19(b) of the Act. See NSX Holdings A&R Certificate, Article Fourth, Section B(i).

than 20% of the votes entitled to be cast on such matter or to enter into an agreement, plan or other arrangement that would violate the Nonvoting Agreement Prohibition, as applicable; the Holdings Board shall have resolved to expressly permit such exercise or the entering into of such agreement, plan or other arrangement, as applicable, and such resolution shall have been filed with the Commission pursuant to Section 19(b) of the Act and shall have become effective thereunder.<sup>46</sup>

The Commission believes that the proposed restrictions on the ownership and voting of members are consistent with the requirements of Section 6(b) of the Act. These restrictions are generally consistent with ownership and voting limits approved by the Commission for other SROs.<sup>47</sup> Moreover, the Commission believes that the proposed ownership and voting limits should reduce the potential that the control of the Exchange by one or a few shareholders would impair the Exchange's ability to carry out its self-regulatory obligations.

## 2. Jurisdiction; Books and Records; Due Regard

As described above, following the Closing, NSX Holdings will be the sole stockholder of the Exchange. Although NSX Holdings will not carry out any regulatory functions, its activities with respect to the operation of the Exchange must be consistent with, and must not interfere with, the self-regulatory obligations of the Exchange. The NSX Holdings A&R Certificate and the NSX Holdings By-laws therefore include certain provisions that are designed to maintain the independence of the Exchange's self-regulatory functions, enable the Exchange to operate in a manner that complies with the federal securities laws, including the objectives of

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<sup>46</sup> See NSX Holdings A&R Certificate, Article Fourth, Section B(ii).

<sup>47</sup> See note 32, supra.

Sections 6(b)<sup>48</sup> and 19(g)<sup>49</sup> of the Act, and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>50</sup>

For example, Article VI of the NSX Holdings By-laws, entitled “SRO Functions of NSX,” governs the conduct of NSX Holdings as the holding company for the Exchange with respect to NSX’s status and obligations as a registered national securities exchange and an SRO.<sup>51</sup> Among the key provisions are requirements that, for so long as NSX Holdings shall, directly or indirectly, control NSX, the directors, officers, employees and agents of NSX Holdings shall give due regard to the preservation of the independence of the self-regulatory function of NSX and to its obligations to investors and the general public and shall not take actions which would interfere with the effectuation of decisions by the Exchange Board of Directors relating to NSX’s regulatory functions (including disciplinary matters) or which would interfere with the Exchange’s ability to carry out its responsibilities under the Exchange Act.<sup>52</sup>

Further, NSX Holdings is required to comply with the federal securities laws, and the rules and regulations thereunder, and must cooperate with the Commission and with NSX pursuant to and to the extent of their respective regulatory authority.<sup>53</sup> In addition, the NSX Holdings A&R Certificate and the NSX Holdings By-laws provide that the officers, directors,

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<sup>48</sup> 15 U.S.C. 78f(b).

<sup>49</sup> 15 U.S.C. 78s(g).

<sup>50</sup> See e.g., NSX Holdings A&R Certificate, Articles Twelfth through Sixteenth and NSX Holdings By-laws, Article VI.

<sup>51</sup> Articles Twelfth through Sixteenth of the NSX Holdings A&R Certificate contain substantially the same provisions with respect to NSX Holdings’ obligations as the controlling entity for the Exchange. See Notice, supra note 4, at 88, n.34.

<sup>52</sup> See NSX Holdings By-laws, Article VI, Section 6.1.

<sup>53</sup> See NSX Holdings A&R Certificate, Article Fifteenth; NSX Holdings By-laws, Article VI, Section 6.6.

employees and agents of NSX Holdings, by virtue of their acceptance of such position, shall comply with the federal securities laws and the rules and regulations thereunder; and shall be deemed to agree to cooperate with the Commission and the Exchange in respect of the Commission's oversight responsibilities regarding NSX and the self-regulatory functions and responsibilities of NSX, and NSX Holdings will take reasonable steps necessary to cause its officers, directors, employees and agents to so cooperate.<sup>54</sup> Furthermore, NSX Holdings and its officers, directors, employees and agents by virtue of their acceptance of such positions, shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts, the Commission and NSX for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules or regulations thereunder, arising out of, or relating to, the activities of NSX, and by virtue of their acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the United States federal courts, the Commission or the Exchange, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter of that suit, action or proceeding may not be enforced in or by such courts or agency.<sup>55</sup> NSX Holdings and its officers, directors, employees and agents also agree that they

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<sup>54</sup> See NSX Holdings A&R Certificate, Articles Twelfth and Fifteenth; NSX Holdings By-laws, Article VI, Section 6.6.

<sup>55</sup> See NSX Holdings A&R Certificate, Article Twelfth; NSX Holdings By-laws, Article VI, Section 6.7. Additionally, as noted, no individual who is subject to any statutory disqualification as defined in Section 3(a)(39) of the Exchange Act may serve as a director or officer of NSX Holdings. See Notice, supra note 4, at 89, n.39.

will maintain an agent in the United States for the service of process of a claim arising out of, or relating to, the activities of the Exchange.<sup>56</sup>

In addition, for so long as NSX remains a registered national securities exchange, the books, records, premises, officers, directors, employees and agents of NSX Holdings shall be deemed to be the books, records, premises, officers, directors, employees and agents of NSX for purposes of and subject to oversight pursuant to the Act.<sup>57</sup>

The NSX Holdings By-laws further provide that NSX Holdings' books and records shall be maintained within the United States and shall be at all times subject to inspection and copying by the Commission and by the Exchange, to the extent that such books and records are related to the administration and operation of the Exchange.<sup>58</sup>

The NSX Holdings A&R Certificate and the NSX Holdings By-laws provide that, to the extent that NSX continues to be controlled, directly or indirectly, by NSX Holdings and to the fullest extent permitted by applicable law, all books and records of the Exchange reflecting confidential information pertaining to the self-regulatory function of the Exchange or its successors (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of NSX Holdings, shall not be made available other than to those officers, directors, employees and agents of NSX Holdings that have a reasonable need to know the contents thereof, and shall be retained in confidence by NSX Holdings, and the officers, directors, employees and agents of NSX Holdings, and not used for

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<sup>56</sup> See NSX Holdings A&R Certificate, Article Twelfth; NSX Holdings By-laws, Article VI, Section 6.7.

<sup>57</sup> See NSX Holdings A&R Certificate, Article Fourteenth.

<sup>58</sup> See NSX Holdings By-laws, Article VI, Sections 6.4 and 6.5.

any non-regulatory purposes.<sup>59</sup> The NSX Holdings A&R Certificate and the NSX Holdings By-laws, however, specify that the NSX Holdings A&R Certificate and NSX Holdings By-laws, respectively, (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or the Exchange to access and examine such NSX confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of NSX Holdings to disclose NSX confidential information to the Commission or the Exchange.<sup>60</sup>

The NSX Holdings A&R Certificate and the NSX Holdings By-laws provide that, for so long as NSX remains a registered national securities exchange, before any amendment to or repeal of any provision of the NSX Holdings A&R Certificate or the NSX Holdings By-laws may be effective, those changes must be submitted to the Exchange Board of Directors, and if the amendment is required to be filed with, or filed with and approved by the Commission pursuant to Section 19(b) of the Act,<sup>61</sup> such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>62</sup>

The Exchange submits that the NSX Holdings A&R Certificate and the NSX Holdings By-laws establish an organizational framework that assures that the Commission and NSX will have regulatory jurisdiction and authority over NSX Holdings and its directors, officers, employees and agents, and will preserve the independence and effectiveness of the Exchange in

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<sup>59</sup> See NSX Holdings A&R Certificate, Article Thirteenth and NSX Holdings By-laws, Section 6.2.

<sup>60</sup> See NSX Holdings A&R Certificate, Article Thirteenth and NSX Holdings By-laws, Section 6.3.

<sup>61</sup> 15 U.S.C. 78s(b).

<sup>62</sup> See NSX Holdings A&R Certificate, Article Sixteenth and NSX Holdings By-laws, Section 7.7(b).

discharging its self-regulatory responsibilities pursuant to the Act.<sup>63</sup> Further, the Exchange represents that these provisions of the NSX Holdings corporate documents will not impair the ability of the Exchange to carry out its functions and responsibilities as a national securities exchange under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder.<sup>64</sup> The Exchange further states that it will continue to enforce the Act, the Commission's rules thereunder, and the Exchange's own rules, in the same manner as prior to the Transaction, and notes that the Commission will continue to have plenary regulatory authority over NSX.<sup>65</sup>

The Commission finds that these provisions are consistent with the Act, and that they are intended to assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act. The Commission also notes that, even in the absence of these provisions, under Section 20(a) of the Act,<sup>66</sup> any person with a controlling interest in the Exchange shall be jointly and severally liable with and to the same extent the Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>67</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act<sup>68</sup> authorizes the Commission to enter

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<sup>63</sup> See Notice, supra note 4, at 89.

<sup>64</sup> See Notice, supra note 4, at 89.

<sup>65</sup> See Notice, supra note 4, at 89.

<sup>66</sup> 15 U.S.C. 78t(a).

<sup>67</sup> 15 U.S.C. 78t(e).

<sup>68</sup> 15 U.S.C. 78u-3.

a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

3. Board Composition; Committees

Following the completion of the Transaction, the board of directors of the Exchange will continue to be the governing body of the Exchange and possess all of the powers necessary for the management of its business and affairs and the execution of its responsibilities as an SRO. In particular, the Exchange A&R By-laws will continue to provide that the Exchange Board shall consist of no fewer than seven or more than 25 directors.<sup>69</sup> In addition, the Exchange Board’s composition at all times shall include the Chief Executive Officer of the Exchange, at least 50% Non-Industry Directors<sup>70</sup> (at least one of whom shall be an Independent Director<sup>71</sup>) and such number of ETP Holder Directors<sup>72</sup> as is necessary to comprise at least 20% of the Exchange Board.<sup>73</sup>

In connection with the Closing, the steps to transition the membership on the Exchange Board from the current directors to the post-Closing directors will conform to the requirements

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<sup>69</sup> See Exchange A&R By-laws, Article III, Section 3.2(a).

<sup>70</sup> The term “Non-Industry Director” is defined in Article I, Section 1.1, para. N of the Exchange A&R By-laws as “a member of the [NSX] Board who is (i) an Independent Director; or (ii) any other individual who would not be an Industry Director.”

<sup>71</sup> The term “Independent Director” is defined in Article I, Section 1.1, para. I of the Exchange A&R By-laws as “a member of the [NSX] Board that the [NSX] Board has determined to have no material relationship with the Exchange or any affiliate of the Exchange, or any ETP Holder or any affiliate of any such ETP Holder, other than as a member of the Board.”

<sup>72</sup> The term “ETP Holder Director” is defined in Article I, Section 1.1, para. E(2) of the Exchange A&R By-laws as “a director who is an ETP Holder or a director, officer, managing member or partner of an entity that is, or is an affiliate of, an ETP Holder.”

<sup>73</sup> See Exchange A&R By-laws, Article III, Section 3.2(b).

set forth in Article III, Section 3.7 of the Exchange A&R By-laws. Furthermore, the Exchange A&R By-laws provides that any vacancy occurring in a committee shall be filled by the Chairman of the Board for the remainder of the term, with the approval of the Exchange Board.<sup>74</sup> Each committee shall be comprised of at least three people and may include persons who are not members of the Board; provided, however, that such committee members who are not also members of the Board shall only participate in committee actions to the extent permitted by law.<sup>75</sup>

The Commission finds that these provisions are consistent with the Act, and that they are intended to assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

#### 4. Changes to the Exchange Organizational Documents

In connection with the completion of the Transaction, the Exchange proposes certain amendments in the Exchange A&R Certificate and the Exchange A&R By-laws. In particular, the Exchange proposes to delete the language in Paragraph Fourth of the Exchange A&R Certificate that provides that the Exchange shall at all times be wholly owned by CBSX and replace that provision with one requiring that the Exchange at all times be wholly owned by NSX Holdings.<sup>76</sup>

In addition, with respect to the Exchange A&R By-laws, the Exchange proposes to replace all references to “CBSX” with references to “NSX Holdings.”<sup>77</sup> Specifically, Article III, Section 3.2(c) of the Exchange A&R By-laws will be amended to eliminate any requirements

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<sup>74</sup> See Exchange A&R By-laws, Article V, Section 5.2.

<sup>75</sup> See Exchange A&R By-laws, Article V, Section 5.2.

<sup>76</sup> See Notice, supra note 4, at 89.

<sup>77</sup> See Notice, supra note 4, at 89.

relating to CBSX and will provide that no two or more directors of the Exchange may be partners, officers or directors of the same person or be affiliated with the same person (or affiliated with the same person), unless such affiliation is with a national securities exchange or NSX Holdings.<sup>78</sup> In addition, the Exchange proposes to replace references to CBSX with references to NSX Holdings in Section 10.2 of the Exchange A&R By-laws. The provision would provide that no members of the Holdings Board who are not also members of the Exchange Board, or any officers, staff, counsel or advisors of NSX Holdings who are not also officers, staff, counsel or advisors of the Exchange (or any committees of the Exchange), shall be allowed to participate in any meetings of the Exchange Board or any Exchange committee pertaining to the self-regulatory function of the Exchange, including disciplinary matters.<sup>79</sup> The Exchange states that these amendments are intended to prevent any undue influence or any perception of undue influence over the Exchange's self-regulatory functions by NSX Holdings.<sup>80</sup>

In addition, the Exchange proposes to delete Section 10.1(b) in the Exchange A&R By-laws, which requires that for so long as CBSX controls the Exchange, the Exchange shall promptly inform the CBSX board of directors, in writing, in the event that the Exchange has, or experiences, a deficiency related to its ability to carry out its obligations as a national securities exchange under the Act, including if the Exchange does not have or is not appropriately allocating such financial, technological, technical and personnel resources as may be necessary or appropriate for the Exchange to meet its obligations under the Act.<sup>81</sup> According to the

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<sup>78</sup> See Notice, supra note 4, at 89.

<sup>79</sup> See Notice, supra note 4, at 90.

<sup>80</sup> See Notice, supra note 4, at 90.

<sup>81</sup> See Notice, supra note 4, at 89.

Exchange, upon the completion of the Transaction, such requirements will no longer apply because CBSX will have no ownership interest in the Exchange.<sup>82</sup>

Finally, the Exchange is proposing certain clarifying amendments, and other non-substantive conforming amendments to the Exchange A&R By-laws that are consistent with the changes described above.<sup>83</sup>

The Commission believes that the proposed changes to the organizational documents of the Exchange are consistent with the Act, and that they are intended to align the Exchange's governance and organizational structure with the proposed ownership by NSX Holdings.

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<sup>82</sup> See Notice, supra note 4, at 89-90.

<sup>83</sup> For a more detailed description of the non-substantive conforming amendments, see Notice, supra note 4, at 90 and Exhibit 5D to SR-NSX-2014-017.

III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>84</sup> that the proposed rule change (SR-NSX-2014-017), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>85</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>84</sup> 15 U.S.C. 78s(b)(2).

<sup>85</sup> 17 CFR 200.30-3(a)(12).